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January 29, 1998

Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, N.W. - Room 222
Washington, D.C. 20554

In re: CC Docket Nos. 92-115

Dear Ms. Salas:

Independent Cellular Services Association ("ICSA"), by its counsel and pursuant to Section 1.1206(b)(2) of the Commission's Rules and Regulations, 47 C.F.R. § 1.1206(b)(2), submits herewith for inclusion in the record of this proceeding the attached letter, dated January 23, 1998, addressed to FCC Chairman William F. Kennard, with attachments. The letter and attachments adequately summarize the oral presentations made by members and representatives of ICSA to various Commission employees on January 27 and 28, 1998.

Kindly direct any questions or correspondence concerning this matter to the undersigned.

Very truly yours,

Robert J. Keller
Counsel for Independent
Cellular Services Association

cc: Commissioners' Offices
Karen Gulick, Legal Advisor to Commissioner Tristani
Paul E. Misener, Senior Legal Advisor to Commissioner Furchtgott-Roth
Office of General Counsel
Lawrence Strickling, Chief, Competition Division
John Berresford, Senior Antitrust Attorney, Competition Division
Wireless Telecommunications Bureau
David Furth, Chief, Commercial Wireless Division
Stephen Markendorff, Deputy Chief (Operations), Commercial Wireless Division

Independent Cellular Services Association

Box 2171, Gaithersburg, Maryland 20886 ; E-Mail ICSA@Bigfoot.Com; 301 523-5187

January 23, 1998

Mr. William E. Kennard
Chairman, Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554

RE: Our Petitions for Reconsideration in CC Docket No. 92-115 - Rule 22.919 Cellular Electronic Serial Numbers and Cellular Extension Telephones - Ex Parte Filing.

Dear Chairman Kennard:

We are writing to you to request a resolution of our Petitions that were filed in 1994. In our last meeting with the Commission in October of 1996, we met with Mr. Blair Levin and Michele Farquhar and they promised action within a few months - over a year has lapsed and both have left the Commission without a ruling. Numerous meetings at the Commission and thousands of pages of documentation have been filed on this topic so that we believe a decision on this critical issue should have been made two years ago. We would like to summarize the many key issues from past Ex Parte meetings and filings. Also, we will introduce a number of new critical issues that need a prompt response from the FCC. We are also attaching a number of documents to provide details and supporting facts relative to our petitions. Summarized below are our key points for consideration:

1. **WHO ARE WE? - ICSA is a trade association made of small businesses that sell and service cellular telephones and was formed in 1995 after the FCC adopted the rules contained in Docket No. 92-115.** CellTek and MTC Communications are members of ICSA and are separate petitioners that filed documents at the very outset of this proceeding. This letter is a combined response for all three groups. Our members are legitimate businesses who want to provide extension cellular telephone service for cellular customers who pay for all calls. This is a service demanded by the public just as consumers have multiple extension telephones in their homes and businesses all with one phone number and monthly fee. This victory came about in the 70's against AT&T in the Carterphone decision. The same issue was fought and won before the FCC in the case of using multiple cable decoder boxes on the same cable TV connection with a single monthly fee. DirectTv and USSB satellite TV only charge an extra $1 or $2 fee per extra satellite receiver. Only the wireless industry requires a full fee for an extra phone.

   We want to be able to reprogram/emulate cellular telephones which will permit cellular extension telephone service for consumers at a low one-time fee. This is the chief issue in our petition. Instead CTIA and its members have monopolized this market and offer their own service at a high monthly fee or require a separate monthly access fee for each

phone. CTIA lobbied the Commission starting in 1991 to pass the ESN rule in Docket No. 92-115 to give them this monopoly.

2. **What is the relationship between cloning fraud and extension phones? Actually none except both involve the programming of phones. CTIA has confused the FCC and legislators into passing rules and laws which make the two interchangeable in an effort for them to prevent or monopolize the extension phone business. This has cost consumers billions of dollars in excessive monthly fees(detailed later) and have made big profits for the carriers.**

   Cloning fraud is defined as the illegal activity of stealing from legitimate customers their phone data and programming it into a second phone to make hundreds of free calls. These calls are charged to the unsuspecting legitimate customer who discoveries this fact on the next cellular bill. In the case of extension phones, the legitimate customer goes to a licensed cellular service firm, who for a one time fee, programs a second phone also owned by this customer with the same number/data as the first phone. All calls made by the extension phone are charged to this bill. The cellular system only allows one phone to be used at time just as one landline phone can only be used one at a time. This emulation is done with the customers written permission.

3. **Attachment 1 is a letter from the Small Business Administration(SBA) to the Commission which "fully supports the petitioners..." . As you can see, SBA has carefully reviewed our petitions and fully agrees with what we propose.**

   SBA stated in a letter to Reed Hundt "The Office of Advocacy believes the petitioners have raised legitimate issues ..." and "the petitioners have offered a number of protections to cellular licensees to insure that fraud is kept to a minimum."

4. **ICSA, CellTek, and MTC Communications had no business relationship with C2+ which was a highly visible petitioner of CFR 22.919. Our petitions were completely separate and should have been addressed years ago. In our October 1996 meeting, Blair Levin and Michele Farquhar pledged to respond to our petition within a few months, but over a year has passed with no response from that meeting. A total of three (3) years have passed since our original petitions were filed which we think is excessive given the importance of this issue.**

   In the spring of 1996, CTIA and some of their members purchased or reached some type of confidential settlement with C2+. We know that one of the conditions was that they withdraw their petition. We know this because several members of the FCC have been mislead by CTIA into thinking that the "settlement" resolved the issue and there was no need to rule on our petitions. We pointed out to Levin, Farquhar and members of her staff that we are independent of C2+. Cellular extension phones and all of the surrounding issues of changing the ESN are still alive and need resolution!

We request that the Commission consider all of the documents that C2+ submitted and are part of the record. We would also like the Commission to investigate the circumstances under which C2+ left the market and requested a withdrawal of their filing with the FCC. Attachment 2 is C2+'s last filing with the Commission following the "Summit Meeting". Did CTIA believe that the elimination of C2+ would cause the all petitions to disappear?

5. **Following an earlier meeting with Blair Levin in July of 1995, there was a "Summit Meeting" held on July 27, 1995 with the FCC Wireless group, CTIA, AT&T, the Justice Antitrust Division, Motorola, Ericsson, TIA, Japan Radio, CellTek, MTC and ICSA. We wrote a report (Attachment 3) which summarized the meeting. Attachment 3-A to that report, which the Wireless Bureau asked us to submit, detailed the revisions to the rules permitting extension phones which we thought all attendees could live with. We believed that the Commission was going to adopt rules favorable to our petitions.**

   At both of the 1995 meetings, we produced an expert witness, Dr. Richard Levine, who testified that no harm would be inflicted on the cellular network if customer owned cellular extension phones were used. In fact, our technical solution of reprogramming the phone was a process that better met FCC rules because all phones could roam. Attachment 4 is extension phone literature from Washington's CellularOne, which states that users can only roam with one phone and yet they are charged $17.95 per month! Attachment 5 is similar literature from Bell South. The monthly charge two phone - one number service is $49 per month. They require as we do that **only one phone can be turned on at a time**. If they can required this type of operation then our customers are just as smart and should be able to follow the same directions. Prior to this July 1995 meeting, Dr. Levine submitted a very detail written report which is on file with the FCC. CTIA had no major objections to this report or to Dr. Levine's testimony. They recognized his outstanding reputation and the power of his arguments.

   Both C2+ and our association recommended that extension phone modifications could **only** be made by licensed technicians, with written permission of the owner and proof of a subscription from that legitimate cellular customer. There are other restrictions but these are the major ones.

6. **We would like to officially enter into the record a second paper/report Attachment 6 filed by Dr. Levine on July 30, 1996. This paper was addressed to Ms. Farquhar as a "Rebuttal of Technological Errors in May 1996 CTIA and AT&T Wireless Submissions". He was not paid to write this report but felt so outraged by the CTIA and AT&T(AWS) documents that he submitted this document to the FCC. We would like to draw from a few of the major points from his report.**

   a. Previously CTIA and TIA had petitioned the FCC to require all carriers and phone manufacturers to implement authentication nationwide to reduce fraud. **In their May 16, 1996 letter to the FCC, CTIA did a complete reversal and asked that their petition be**

refused! If CTIA and their carrier members were serious about cloning fraud they would want mandatory authentication. Both Dr. Levine and our firms were amazed that CTIA would back away from what they often refer to as the "silver bullet of cellular cloning fraud". It would not surprise us that CTIA and its members are about to do another total reversal and may embrace our extension telephone approach as soon as they obtain the new Federal Law that give them a monopoly on ownership of the programming tools. This law is covered in detail in a later paragraph.

b. AWS and CTIA tried to make the point that an extension phone would interfere with their RF fingerprinting and other fraud systems. Dr. Levine pointed out as we have that there can be multiple fingerprints. With the older 3 watt booster kits for portables, there have to be two or more fingerprints.

c. Dr. Levine pointed out that Bell South is using a system called Cellemetry which uses the back channels to send data. The data is contained in the 32 bit ESN which they "tumble" and certainly violates 22.919. Bell South went to Federal Court in Atlanta to prosecute several extension phone firms and told the court that changing the ESN violated Rule 22.919 while they were simultaneously selling and using Cellemetry. This just shows hypocrisy surrounding this rule.

d. Dr. Levine in his 7/30/96 report wrote many pages refuting AWS comments which he says are just not true. **We request that the Commission disregard all AWS comments since they do not have standing in this reconsideration**. They did not originally submit any comments by the deadlines set forth in the Commission's rules on reconsideration. AWS is a member of CTIA and should use this means of communications with the FCC.

7. **In 1995, we believed that we had finally explained to key members of the Commission the difference between cellular extension telephones reprogrammed at the request of a paying customer and the cloner who steals airtime. We also showed that the cellular industry was trying to monopolize the industry and collect a monthly fee for every cellular telephone instrument even though there are many customers who need who need only one phone line/number. CTIA has used the fraud issue as a way to over charge cellular users by billions of dollars.**

a. We do not agree with paragraph 60 of the report and order which gives authority to alter the ESNs of cellular telephones exclusively to the cellular carriers. Since only one extension phone can be used at the same time, we do not believe that this is "fraudulent" use just as an extension phones in one's home or office is not fraudulent. We believe that the monthly access fee is for a single number/line. The use of several phones with the same number one-at-a-time (which is forced by the cellular system) should be permitted. We strongly disagree with paragraph 60 which says that cellular carriers are entitled to all cellular revenue because these are public airwaves. The fact that cellular telephones use radio waves instead of wires is a totally misleading argument which CTIA has foisted upon the Commission in this reconsideration.

b. Should the FCC ever permit landline telephone companies or cable companies to again charge a fee for each phone or box, there would a public uprising. Because cellular consumers have not been educated about this issue, they don't fully understand the technical and business issues. On the FCC's cellular web page(Attachment 7), extension phones are the second most frequently asked question. In light of paragraph 60 of the Commission's order, we don't believe the public is getting an honest answer. The ESN can be emulated if the carrier permits it according to paragraph 60.

8. **Permitting extension telephones is clearly in the Public Interest when it comes to safety and health issues and should be permitted by the Commission!**

a. Best Results - Approximately 80% of the new phones sold today are .6 watt handhelds. These phones do not work as well as 3 watt mobiles with an external 3 dB gain antenna. Customers should be allowed to have a portable on the same number as the mobile. Instead they have to subscribe to two services with two different phone numbers. Caller have to try each number. Many customer have discontinued their car service high monthly charge. They often approach our members to have their mobile unit put back on the same number when they find the portable does not work well. They should be able to take advantage of the features of both phones.

b. Handsfree Operation in Vehicles - There has been much written recently about the dangers of using a cellular telephone while driving. Mobiles with speaker phones are clearly the safest unit to use while driving. The most dangerous is the handheld - we have observed many cellular users holding a flip phone in one hand and dialing with the other while no hands are on the wheel! Permitting both types of phones on the same number by a single user is the ideal configuration and should be permitted.

c. Health Worries - Many of our customers would like to use a mobile most of the time and only revert to the portable cell phone when a call **must** be made outside the vehicle. While the data is inconclusive when it comes to portable phones causing health problems, the surest way to minimize the exposure is to use the handheld as little as possible until testing clarifies the concern. Booster Kits are very expensive, are not reliable and take time to plug and unplug. We believe that the best option is to use the two phone-one number approach.

The Commission's rule to prevent extension phones denies the customer the choice to use the safest and most economical combination of phones.

9. **There are two reasons that contribute to cloning fraud. The reason always cited by CTIA and it members is that the MIN/ESN combination are picked up over the air by readers. They fail to mention that these pairs are often sold, found in the trash or otherwise expropriated from the carrier, dealer, agent, etc. The most important reason is that the many cellular telephone manufacturers have consistently designed phones that violate the old and NEW ESN rules. This is the real reason that cloning chaos has rained down on millions of cellular customers in this country causing**

countless inconvenience and economic loss by customers. One example is the billions of times Americans have had to take time to enter PIN CODES. Most carriers require customers to pay for this air time.

HAD CTIA AND ITS MEMBERS COMPLIED WITH THE FCC's HARDED ESN RULE IN THE MANUFACTURING AND SELLING OF PHONES FROM THE OUTSET, THERE WOULD HAVE BEEN NO CLONING FRAUD. IN THE NEW RULES THAT WENT INTO EFFECT IN 1995, THE FCC SET STRICTER AND MORE SPECIFIC RULES FOR ESNs IN RULE 22.919. THIS WAS A WAKE UP CALL! THIS RULE WAS TO BE IMPLEMENTED BY MANUFACTURERS WHO ARE CTIA MEMBERS. UNBELIEVABLY, CTIA's MEMBERS HAVE CONTINUED TO VIOLATE THE VERY FCC ESN HARDENING RULES WHICH THEY REQUESTED THE FCC PASS. INCONCEIVABLY, CTIA AND MEMEBERS THEN USED VIOLATIONS OF THIS RULE TO GO TO FEDERAL COURT AND PUT MORE THAN 15 EXTENSION PHONE FIRMS OUT OF BUSINESS. AT THE SAME TIME THEY SOLD MILLIONS OF PHONES WHICH WE BELIEVE DO NOT MEET FCC TYPE ACCEPTANCE. IF THESE PHONES DO NOT MEET TYPE ACCEPTANCE ACCORDING TO THE COMMISSION'S INTERPRETATION OF THEIR RULES WHEN THEY LEFT THE FACTORY, EXTENSION PHONE FIRMS CAN'T BE THEN HELD RESPONSIBLE FOR VIOLATING A RULE ALREADY BROKEN. IT SEEMS TO US THAT THE COMMISSION HAS GOT TO EITHER WITHDRAW TYPE ACCEPTANCE AND RECALL THESE PHONES; OR TO AMMEND THE RULES TO PERMIT EXTENSION PHONES.

At the "Summit" meeting and in the Ex Parte document that we wrote summarizing the meeting, we pointed out that most of the cellular telephones that has been produced to date did not met the original FCC rules for harden ESNs. Messrs. Altschul and McClure from CTIA and Ms. DeMaria from AWS were in attendance and were copied by us on minutes of the meeting. They should have focused on the new phones type accepted after January 1, 1995 to make sure that they met the new rules but obviously they did not. Our conclusion is that their main interest is in monopolizing/preventing the extension business and use cloning fraud as a ruse.

When we met with Levin and Farquhar, we showed the #1 best selling phone that had had its ESN changed. It was type accepted after the new rules went into effect on January 1, 1995. With a changed ESN, it works fine. This cellular phone is even on CTIA's certified phone list. We have since compiled an extensive list of phones and manufacturers that do not meet CFR 22.919. We are adding phones to this list constantly. These phones are in the FCC database as being submitted and type accepted after the new 22.919 rule went into effect. We can prove our claims. We don't believe extension phone firms should be driven out of business because they are exploiting a failure of the manufacturers to meet the new FCC rules. The Commission should withdraw type acceptance. Also, we believe that millions of these phones have been produced since the rule went into effect and should be recalled. Our analysis follows:

a. The new part CFR 22.919 states that "the ESN host component must not have it terminals accessible". These phones have external terminals and can have a programmer/computer cable connected where the charger cord connects.

b. 22.919 continues to state that "the ESN must be factory set and not be alterable". The ESN can be changed in seconds and as many times as wanted.

c. Finally should the ESN be changed then this "will render the mobile transmitter inoperable". We can show that all phones work perfectly.

It is obvious that several of the large manufacturers have ignored this rule and gained type acceptances of many phone types after 22.919 took effect. We showed Farquhar and Levin literature on a number of firms that sell boxes and adapters that take only seconds to change an ESN on many types of new phones. In Attachment 8 are the ads we showed them. In our summit meeting that we refer to in paragraph 5 above, TIA and the manufacturers were on our side and opposed the new ESN rule. It is obvious that they have ignored the rule and we can produce samples of these phones with the type acceptance data from your files.

Had the manufacturers, CTIA and the carriers enforced the ESN rule from the beginning, then there would have never been the extensive cloning fraud. The public has never been told the truth about this issue. Using CTIA's own figures of $700 Million per year in cloning fraud and assuming on average a $500 bill prior to shut off and number change, this means that 1,400,000 customer could have been cloned per year. If this number is applied over a three year period then there are over 5,000,000 customers that have been illegally cloned. This is an outrage and the cellular industry should be fined or otherwise punished by the Commission for all of the costs and inconvenience suffered by the public. The GSM phones used in Europe have never been cloned because they were designed properly from the outset. Had CTIA followed the letter of the FCC ESN rules there would have been little or no cloning fraud.

CTIA has filed numerous documents with the commission stating that the ESN is analogous to the VIN plate riveted to the frame of new cars and therefore should never be changed. While this may be the original intent or desire, it is very clear that the ESN is more analogous to the license plate. With simple tools, the ESN can be changed in seconds. In all modern phones the ESN is stored in non-volatile memory and can be changed in seconds if the manufacturer exposes the terminals and does not encrypt the data. The ESN in most phones is similar to the BIOS in personal computers - it can be changed in seconds. There is free software and directions for building cables on the Internet. There are countless firms advertising these tools and services in magazines and on the Internet. Many are in Canada, Mexico, England and other foreign countries where there are no rules against extensions. So any laws or rules in this country will not stop the changing of the ESN unless the manufacturer takes steps to prevent it.

We hope the above information provides insight to the Commission on how phones can easily be reprogrammed with little or no technical training or investment. If CTIA and its members haven't take the care to protect the ESN, then there is no reason for others to do so!

10. **CTIA and its members have publicly stated that cloning fraud has been reduced by 80% to 90% in high fraud areas such as New York. Attachment 9 has several representative articles. Reasons cited by the CTIA and their members include PIN codes, authentication, fingerprinting and software that looks at calling patterns. This fact supports our petition for reconsideration in two ways:**

    a. None of the articles published by CTIA and the cellular industry on cloning fraud reduction gives credit to the hardening of the ESN. This is the key issue of the rule in CFR 22.919. In our filings and at the meetings at the FCC, we have consistently stated that the changes in the rule would not aid in the fight against fraud. Clearly the lack of mention by CTIA or its members over the last three years derived from the benefits of the hardening of the ESN clearly supports our position on this petition.

    b. On the other hand, CTIA and its members may have not mentioned any benefit from the hardened ESN rule because they know that some of the largest manufacturers have ignored this rule as we have pointed out elsewhere in this document.

    In either case, the only use of rule 22.919 by CTIA and its carrier members over the past 3 years seems to be to force extension firms out of business. As we had predicted all along it had no effect on cloning fraud.

11. **Using CTIA's own web site, there is a cellular statistics section(Attachment 10) which states that there are 18 millions cellular telephones that are inactive(no subscription) at the end of 1996. Given this large supply of phones plus those customers who have two or more active phones because they can't have extension phones - we estimate that 1 in 3 cellular customer would have an extension phone if they were permitted and priced at about $3/month. This would save consumers $3.4 Billion dollars per year!!! We believe that the increased airtime from these millions of extra active extension phones would offset the loss of the per line monthly fee.**

    In the December 1, 1997 Commission decision on docket 94-102 dealing with 911 calls, one of the remaining problems is how to do call backs to the tens of millions of unsubscribed phones mentioned above. One way to solve part of that problem is to permit extension phones for those owners who have an active subscription/phone and one or more inactive phones. They would then have a valid identity and call back number for the PSAP.

12. **Competition has not lower monthly wireless access cost for primary or carrier provided extension phones. Extension phones would help increase competition and save the public about $3.4 Billion per year as stated above.**

At several of the past meetings, member of the Commission have made the point that once other wireless services such as PCS roll out, the price per line would decline for a second number or extension service. Using the Baltimore/Washington area where the Commission can easily check our figures, the three new entries have set higher prices. AT&T's minimum plan is $24.95; Sprint's minimum plan is $25; Nextel starts at $49. Only CellularOne offers extension phone service for $17.95. Incredibly the same company offers full single line cellular service to the State of Maryland and employees of local governments in the state for only $3.50 per month - this is 1/5 of cost for a much lower level of service!! Attachment 11 is a bill for one city employee and clearly proves that CellularOne could sell their extension service for less than $3 if there was competition. Literature for their FlexPhone service is Attachment 12 and it states that only one phone can roam. This violates FCC rules which states that all phones should be able to roam.

Our members can offer better service(both phones roam and have one number/one bill) for about **$3 per month per extension phone**. This is based on an amortization of a one-time fee of $100 over 3 years.

13. **Extension phones work and customer want them. We estimate that there could be 100's of thousands of non carrier provided extension phones in use in the country. Our perception is that customers love extension service and there have been no problems. CTIA has never documented problems such as false billing or cases where illegal cloners have "hidden" somehow behind the extension phone as CTIA and AWS have alleged. During this reconsideration, CTIA never provided proof of a single customer problem or a case where one of the C2+ dealers or one of our members provided a cloned phone that stole service from another legitimate subscriber. In fact many of C2+'s documented customers were carriers/CTIA members.**

14. **NEW FELONY LAW - CTIA is attempting to circumvent the authority of the Commission in this matter. CTIA has sponsored legislation (S. 493 and H. R. 2460) that makes it a felony for anyone who is not a carrier or an agent to posses "hardware or software, knowing that it has been configured for altering or modifying a telecommunication instrument". It is clear from CTIA President Tom Wheeler's testimony to the House Judiciary Committee on Crime that these bills are directed at the independent cellular service firms. THE YATES CASE HE CITED IN HIS TESTIMONY WAS ABOUT EXTENSION PHONES. The Senate bill has passed and the House Bill is pending. This is why the FCC needs to weigh in one way or the other on this issue because the regulation of communications devices and services should fall to the Commission not the Legislature. If a felony law is passed, it should be oriented toward manufacturers who have produced phones that can easily be cloned. 800 cloning cases have been prosecuted under current laws so a new law is not needed. We believe there are 10's of thousand of honest people who possess software that has been purchased or download from the internet which can**

Tom Wheeler testified before the Judiciary Committee that the cellular industry needs this new law added to Title 18 #1029 so they can successfully prosecute such cases as United States vs. Yates. I attended this trial and helped the defense so that I am thoroughly familiar the facts. What Wheeler **did not tell the Judiciary Committee was that Mr. Yates was an honest young family man who only alleged crime was that he was in the extension phone business**. The jury found Yates innocent in just 2 hours. In a second charge, CTIA even tried unsuccessfully to convince the jury that the carrier owned the ESN in the customer's cell phone. Several members of the jury pool were eliminated because they were cellular extension phone customers - they were not Yates' customers. In a second case in Georgia, a Federal Judge also found that extension phones did not violate Federal Fraud laws.

CTIA fears the extension business and will go to any length to eliminate competition. This law, if passed, allows them to own and use the programming equipment exclusively so they can monopolize the extension market or to keep it off the market so as to require one phone per line/number. This will result is less competition, higher prices and a true monopoly.

15. **What would we like the Commission to do?**

a. First we would like the Commission to notify Congress that the cellular extension telephone issue is under reconsideration and will be resolved shortly. They should either amend H. R. 2460 or delay passage until the Commission has ruled.

b. We would like the Commission to decide in our favor on our petitions and adopted our recommendations for permitting extension phones under a tight set of controls. Cellular extension phones should be created by licensed technicians with written permission of a legitimate cellular customer. See Attachment 3-A for our detailed implementation.

c. Should the Commission decide not to change or modify the rules that govern ESNs and extension phones then we believe that the cellular telephones that have not met the conditions set forth in rule 22.919 should have their type acceptance withdrawn. All those phones receiving type acceptance since January 1, 1995 should be recalled and replaced by the offending manufactures and carriers who sold the phones. Fines should be levied against these firms. We can formally request this action, supply a list of manufacturers and demo phones that do not meet 22.919.

16. **Our Conclusions - We believe that we have a strong case for reconsideration of Rule 22.919 and the Report and Order Paragraphs 60-62 and we have waited over three years for a decision. CTIA has been very effect in confusing the Commission and lawmakers in thinking that cloning fraud(theft of airtime) is the same issue as extension phones. Many of our members who are small businesses have been threaten or put out of business by CTIA and the big carriers using the Federal Courts, Law Enforcement and CFR 22.919 as their legal base to monopolize or**

eliminate the extension business. At the same time they have sold millions of phones that do not meet the very rules they requested. Ironically these phones produced and sold by CTIA members are the leading case of cloning fraud. This fact and others in this filing clearly demonstrate that CTIA's real objective with CFR 22.919 is to eliminate or monopolize the extension phone business -- not to eliminate cloning fraud. Dr. Levine, a renowned technical expert, has testified before the FCC on several occasions that extension phones do not harm the network and is preferable to the carrier based solutions. We believe that extension phones are clearly in the public interest by improving cellular safety, security and convinience. It will introduce a form of competition by saving consumers about $3 billions per year. All other similar telecommunications service such as wireline telephone and cable TV pay by the line not by the device. If CTIA and its member were in the electric utility business they would charge by the number of wall outlets not by the kilowatt hour! If CTIA succeeds in getting H.R. 2460 passed in the House they will then have unlimited power to totally control the market. Please take action.

Sincerely,

Ron Foster

Ron Foster
President ICSA
Also for CellTek and MTC Communications

cc Mr. David Furth

We have sent this letter to the FCC Secretary as an Ex Parte filing.

Attachment 1

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

4

Honorable Reed Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Dear Chairman Hundt:

On December 19, 1994, a number of petitions for reconsideration were filed in response to the Commission's Report and Order in CC Docket No. 92-115, Revision of Part 22 of the Commission's Rules Governing the Public Mobile Radio Services (September 9, 1994). The Office of Advocacy has reviewed this material and believes that the Commission should grant the petitions for reconsideration to address the very important small business issues raised by the petitioners.

As you know, the Commission issued a notice of proposed rulemaking to revamp the licensing of commercial mobile radio services in 1992. The Office of Advocacy filed extensive comments in response to that notice and our comments focused almost exclusively on efforts to improve the licensing regime for paging operators.[1] The Commission adopted our suggestions that Part 22 applications not be permitted on first come, first serve basis and that multichannel transmitters for paging service be approved. The Office of Advocacy commends the Commission for taking these vital steps in ensuring that only serious and viable candidates are considered for licenses pursuant to Part 22.

In the notice of proposed rulemaking, the Commission offered a potential solution to cellular telephone fraud.[2] According to the Commission, tampering with the cellular telephone's

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[1] Until contacted by small businesses involved in reprogramming cellular telephones, the Office of Advocacy was not aware of the significance of the Commission's action with respect to cellular licensees.

[2] The Office of Adovcacy's support of the petitions for reconsideration in no way condones the use of technology to defraud holders of cellular telephone licenses. Thus, the Office of Advocacy strongly endorses efforts by the Commission and appropriate law enforcement agencies to prosecute, to the full extent of the law, those businesses that reprogram cellular telephony equipment for customers who do not have a valid contract with an appropriate cellular licensee or reseller.

telephones.[5] Nothing in the Communications Act mandates that cellular telephone companies are entitled to any specific amount of revenue for use of a public resource.[6]

The Office of Advocacy does not believe that the Commission has stated adequate grounds in support of its prohibition on reprogramming cellular ESNs. The Office of Advocacy believes that the petitioners have raised legitimate issues that need a full reexamination. Furthermore, the petitioners have offered a number of protections to cellular licensees to insure that fraud is kept to a minimum.[7] The Office of Advocacy fully supports the petitioners efforts to maintain their businesses (most of which are relatively small), provide a useful service to many cellular customers, and ensure the existence of competition to cellular licensees in the provision of one-number cellular service.

Sincerely,

Jere W. Glover
Chief Counsel for Advocacy

cc: Honorable Andrew Barrett, Commissioner
Honorable Rachelle Chong, Commissioner
Honorable Susan Ness, Commissioner
Honorable James Quello, Commissioner

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[5] The record is replete with examples of cellular telephone companies offering one number for multiple telephones but with their service the customer would have to pay a monthly charge for the feature.

[6] Unlike their wire-line telephony siblings, cellular telephone companies face direct competition with another cellular telephone provider, resellers of cellular service, and soon, personal communication service providers. The Office of Advocacy does not understand why cellular telephone companies deserve the right to all revenue from one number for multiple cellular telephones when the Commission is trying to increase competition in wireless service.

[7] It would indeed be naive of the Commission to believe that any regulatory regime, including prohibition, would eliminate fraud. That would require a change in human nature -- not even something the Commission appears to have the power to modify.

electronic serial number (ESN) has increased the opportunity for theft of cellular telephone service. The proposal found strong support from the cellular telephone industry. However, strong opposition was raised by companies that reprogram cellular telephones to emulate an ESN on another telephone; in essence creating an extension cellular telephone.[3]

The Commission adopted the proposed rule for three reasons. First, the Commission found that simultaneous use of cellular telephone ESNs, without the cellular licensee's permission, could cause problems in some cellular systems such as erroneous tracking or billing. Second, use of ESNs without the licensee's permission could deprive cellular carriers of monthly per telephone revenues to which they are entitled. Third, telephones altered without licensee permission would be tantamount to the use of unlicensed transmitters in violation of § 301 of the Communications Act. An examination of these rationales demonstrates that the Commission is more interested in protecting cellular telephone company revenue than preventing fraud.

First, the Commission cites no evidence that a company like C2+ or one of the many smaller businesses that reprogram ESNs for valid customers of cellular telephone companies is committing fraud, i.e., stealing service for which the reprogrammer's customers are not subscribers to the telephone licensees cellular service. The petitioners have offered to provide a computerized database, if necessary, of their customers to cellular telephone companies to show that only customers with valid cellular contracts are receiving the reprogramming of ESNs. Nothing in the record demonstrates that this option would not be adequate in preventing fraud.[4]

Second, the Commission seems to believe that cellular telephone companies have some unbridled right to revenue. Prohibiting the use of ESN reprogramming would simply ensure that current cellular licensees capture all of the revenue associated with providing one-number cellular telephony to multiple cellular

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[3] As with an extension telephone in the home, two cellular telephones with the same ESN could not be used simultaneously. And two cellular telephones with the same ESN could be not be used to make calls to each other.

[4] Obviously, unscrupulous businesses could reprogram cellular telephones without obtaining evidence of a valid contract between the customer and the cellular telephone company. However, the Commission's prohibition still would not prevent the operation of unscrupulous operations. It would simply make illegal currently legal operations and change law-abiding citizens into criminals by the stroke of the regulators' pen.

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

AUG 24 1995

Ms. Regina M. Keeney, Esq.
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 5002
Washington, DC 20554

Dear Ms. Keeney:

On July 27, 1995, the Wireless Telecommunications Bureau (Bureau or WTB) convened a meeting of interested parties to address issues arising from the Commission's decision to prohibit certain uses of electronic serial numbers (ESNs) in cellular telephones. As you know, that decision is the subject of a petition for reconsideration filed by C2+ in CC Docket No. 92-115. The Office of Advocacy made an ex parte filing in support of the petition for reconsideration.

The Office of Advocacy is troubled that the Bureau's staff, despite its awareness of our ex parte filing, failed to inform the Office of Advocacy of the meeting, much less invite representatives of the Office to attend. The oversight is made more egregious by the WTB's invitation of the Justice Department even though Justice has not yet taken a position in this proceeding. The Office of Advocacy believes that all federal agencies which had expressed an interest in this matter should have been invited to this meeting.[1]

The Office of Advocacy has reviewed the ex parte filing made by C2+ in response to the Bureau's request at the July 27 meeting for a proposed rule that would enable businesses to reprogram ESNs while reducing the possibility of fraud in use of cellular telephones. The Office of Advocacy opines that the solution offered by C2+ represents an adequate accommodation of the competing interests in this proceeding.

C2+'s proposed rule would make illegal the alteration of an ESNs without the express consent of an authorized user of a cellular telephone, prohibit transfers of ESNs to phones not owned by the subscriber to cellular service, and debar modification of ESNs if the reprogramming inhibits proper identification of the mobile carrier.

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[1] As you know, the WTB has relied extensively on the Office of Advocacy's expertise in definitions of small business for the purpose of conducting spectrum auctions.

the reprogramming inhibits proper identification of the mobile carrier.

What C2+'s proposed rule would not prevent is the offering of cellular extension service by some party other than the licensed cellular providers for the area. As the Office of Advocacy noted in its ex parte communication in support of the petition for reconsideration, nothing in the Communications Act mandates that cellular telephone companies are entitled to any specific amounts of revenue for its development of public resources. C2+'s proposal would protect cellular companies to the extent possible from fraud[2] without denying the public needed competition in the provision of cellular extension telephone service.

If the Office of Advocacy can be of any further assistance to you, please do not hesitate to contact me or Barry Pineles of my staff at (202) 205-6532 to discuss this issue. To the extent that the Commission convenes any further open meetings on this subject, the Office of Advocacy requests that it be invited.

Sincerely,

Jere W. Glover
Chief Counsel for Advocacy

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[2] Other more sophisticated methods of obtaining cellular telephone numbers and ESNs exist. Prohibiting ESN reprogramming would simply eliminate legitimate businesses, most of which are small, while doing nothing to stop unscrupulous parties from using more sophisticated mechanisms to steal ESNs.

Attachment 2

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August 10, 1995

BY HAND

Mr. William F. Caton, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Petition for Reconsideration in
CC Docket No. 92-115 -- Ex Parte Presentation

Dear Mr. Caton:

This is to provide notice, pursuant to Section 1.1206 of the Commission's Rules, that C-Two-Plus Technology, Inc. ("C2+") delivered today the attached letter and exhibits to Regina M. Keeney, Chief of Commission's Wireless Telecommunications Bureau ("Bureau"). An original and two copies of this letter and the attachments are being submitted for inclusion in the above-referenced docket.

The letter to Ms. Keeney and the exhibits are being submitted in response to the Bureau's request at the July 27, 1995 meeting which it convened to discuss various issues raised in the pending petitions for reconsideration in the above-referenced proceeding. At the Bureau's request, copies of the letter and the exhibits are being served on the parties indicated in the certificate of service attached to the letter.

If you have any questions regarding this matter, please contact me.

Very truly yours,

Timothy J. Fitzgibbon
Counsel for
C-Two-Plus Technology

TJF:kdd
Enclosure
cc: Regina M. Keeney, Esquire

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August 10, 1995

BY HAND

Regina M. Keeney, Esquire
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Re: C-Two-Plus Technology, Inc.
Petition for Reconsideration
CC Docket No. 92-115

Dear Regina:

This is to follow-up on the meeting convened by the Wireless Telecommunications Bureau on July 27, 1995 to discuss the pending petitions for reconsideration of the Commission's Report and Order, 9 FCC Rcd. 6513 (1994), particularly Paragraphs 54-63 and new Rule §22.919 concerning Electronic Serial Numbers ("ESNs"). On behalf of C-Two-Plus Technology, Inc. ("C2+"), we appreciate the Bureau's efforts in bringing the parties together to discuss the issues raised in the pending petitions.

At the request of the Bureau, we have prepared the revised proposed Rule §22.919 attached as Exhibit 1, which we believe will significantly benefit cellular consumers, increase airtime revenues for carriers, and preserve and enhance anti-fraud efforts. In order to facilitate consideration and discussion of our proposal, we have attached as Exhibit 2 a brief explanation of the rationale for each provision of the proposed rule. Finally, we have attached as Exhibit 3 various "Additional Restrictions" which could be incorporated into the rules, set forth in the Commission's decision on reconsideration, or otherwise implemented if the

parties agree that any or all of those provisions will assist in combatting cellular fraud. We have included a brief explanation of the rationale for each Additional Restriction.

We believe that the public interest requires significant modification of Rule 22.919 and the Report and Order, particularly Paragraphs 60-62 (which were referred to at the July 27 meeting as the "Policy Statement on Altering the ESN of a Cellular Telephone or Knowing Use of a Cellular Telephone with Altered ESN"). Although we do not concede that Paragraphs 60-62 of the Report and Order constitute a formal Policy Statement by the Commission, we will use that term here for convenience only. With the exception of the Cellular Telecommunications Industry Association ("CTIA") and McCaw Cellular Communications, Inc. ("McCaw"), the parties at the July 27 meeting agreed that the current rule and "Policy Statement" will: (a) have little or no effect in achieving their stated purpose of fighting cellular fraud; and (b) deny significant benefits to legitimate cellular subscribers.

The positions stated by Telecommunications Industry Association ("TIA") at the July 27 meeting were consistent with the prior statements of the manufacturers in this proceeding. For example, TIA has stated that Section 22.919 is "an expensive and ineffective method of fighting cellular fraud" which "will never be successful" and "will substantially increase the cost, and decrease the quality of service and equipment, to consumers." TIA Petition for Clarification and Reconsideration, filed Dec. 19, 1994 ("TIA Petition") at iii-iv. Ericsson Corporation ("Ericsson") also has stated that by prohibiting all ESN transfers, Section 22.919 "will cause significant hardship to consumers, cellular carriers and manufacturers, without any significant corresponding increase in the cellular industry's ability to meaningfully combat fraud." Ericsson Petition for Reconsideration, filed Dec. 19, 1994 ("Ericsson Petition") at 3-4. Matsushita Communications Industrial Corporation of America ("Matsushita") previously stated that a ban on all ESN transfers "would impose substantial costs and inconvenience on manufacturers and, more importantly, on cellular phone subscribers" without adding significantly to fraud prevention. Matsushita Comments in Support of Petitions for Reconsideration, filed Jan. 20, 1995 at 3.

Dr. Richard Levine, a cellular expert retained by C2+, reached the same conclusions: "Neither the present wording of Rule 22.919 nor the proposed modifications sug-

gested by the TIA and CTIA will advance the cause of fraud prevention or inhibit fraudulent cloning of cellular telephone sets, but instead will deny legitimate uses of modified ESN such as emulated extension service." R.C. Levine, "Report on ESN Emulation and Cellular Phone Extension Service," submitted by C2+ on July 7, 1995 ("Levine Report") at 3. Moreover, Dr. Levine concluded that "the use of emulated extensions provides a technologically superior method for providing extension service" as compared to the "Multiple Units Same Directory Number" ("MUSDN") service offered by the carriers. Id. at 2. Significantly, CTIA represented at the July 27 meeting that it had no real dispute with the Levine Report.

Finally, the Commission's "Policy Statement" must be modified because it is wholly unsupported by the record in the rulemaking proceeding, inconsistent with existing Commission practice, and has been used by the carriers as a weapon to attempt to drive C2+ and other providers of emulated extension service out of business. Although the carriers claim that the current "Policy Statement" is merely a reiteration of similar statements made in a 1991 Public Notice and a 1993 Letter from the Mobile Services Division to CTIA (see Tab Nos. 6 and 8 of the three-ring binder distributed by CTIA at the July 27 meeting), the fact is that those statements were aimed at fraudulent ESN transfers performed without the knowledge or consent of the subscriber in order to place calls which would be billed to unsuspecting subscribers or unable to be billed at all. Significantly, the 1993 Letter was issued only after CTIA erroneously stated in ex parte meetings with the Commission staff during the course of the rulemaking proceeding that C2+ represented "a potential threat" of fraudulent "cloning of cellular ESNs on a scale heretofore not possible." See C2+ Reply to CTIA Opposition to Petition for Reconsideration, filed Feb. 2, 1995 at 4-7 and Appendix 1, Exhibit B at 1.

In fact, the Commission has never applied any of those previous statements to prohibit the transfer of an ESN from one mobile station, owned by a subscriber and properly registered with the cellular carrier, to another mobile station to be used by the same subscriber. For example, the record in the rulemaking proceeding clearly demonstrates that TIA members for years have transferred ESNs from one cellular phone to another as part of their standard repair procedures, a fact which has been well known to the Commission at least since 1992. Yet, the Commission has never interpreted the provisions of the 1991 Public Notice or the 1993 Mobile Services Division Letter to prohibit such transfers.

To the contrary, these transfers have been encouraged by the carriers and have not been prohibited by the Commission because they are not fraudulent and they result in substantial benefits for consumers. The record unequivocally establishes that the manufacturers' ESN transfer repair program: (a) was "developed at the insistence of cellular carriers who do not want their subscribers inconvenienced in any manner;" (b) "has been positively accepted by a number of cellular service providers, as well as the cellular user public;" and (c) has been expressly permitted under "the equipment certification program currently operated by CTIA." See Ericsson Petition at 4, n.4; Reply Comments of Motorola, Inc., filed Nov. 5, 1992 at 2-3. The same considerations of efficiency, convenience and non-fraudulent use should apply to the ESN transfers performed by C2+ in order to provide cellular extension services to legitimate subscribers. Nevertheless, the carriers have used the "Policy Statement," particularly Paragraph 62 -- which by TIA's own admission at the July 27 meeting would apply equally to prohibit the manufacturers' repair procedures -- selectively against C2+ and other providers of emulated extension services because those services adversely affect the carriers' monthly recurring revenue stream while the manufacturers' repair services preserve it.

Thus, the record clearly supports Dr. Levine's conclusion that the only "foreseeable effect" of the current rule and the "Policy Statement" is to "prevent legal provision of emulated extension mobile stations" and other benefits to legitimate subscribers. Consequently, we believe that the public interest requires significant modification of the "Policy Statement" and Section 22.919 of the Rules. We have endeavored in the attached proposal to achieve the following objectives:

1. To preserve and enhance the industry's ability to combat ESN-based cellular fraud;

2. To preserve the obvious consumer benefits which result from the existing repair procedures described by the manufacturers and from proper use of "extension" cellular phones which emit the ESN of the subscriber's primary cellular phone, thereby ensuring that the subscriber will be billed properly by the carrier for calls using the extension phones;

3. To set forth more clearly the responsibilities of manufacturers, carriers, extension service providers and consumers in combatting cellular fraud; and

4. To ensure that "extension" cellular phones are used properly by subscribers; to compensate carriers fairly and reasonably where a cellular subscriber uses cellular extension phones improperly, resulting in additional cost to the carrier; and to require persons using cellular extension phones improperly to bear the resultant costs.

We encourage other parties to suggest any changes, additions, deletions or other proposals which would better serve all of the above objectives. We remain available to discuss these proposals with the Bureau and the other parties.

Finally, there are two additional matters which we have not addressed directly because they are beyond the scope of the ESN issues addressed by Section 22.919 and the "Policy Statement" and we do not want to unduly expand the topics of discussion and the time burden on the Commission. However, they relate to the issue of cellular fraud and the Commission should be aware of these matters as it considers this proposal. First, there are other rules which could be added or modified to combat more effectively non-ESN based cellular fraud and to protect against malicious system hacking. We are available to discuss with the Commission at a later appropriate time additional measures that could be implemented to fight cellular fraud accomplished through "hijacking" and other means.

Second, the industry consensus appears to be that authentication will provide a greater degree of security against cellular fraud and is not inherently inconsistent with extension cellular service. C2+ and other providers of emulated extension services could greatly assist the industry in upgrading mobile stations to incorporate authentication software by offering this service whenever a subscriber requests an emulated extension phone. C2+ also could upgrade software in some cellular mobile stations to eliminate flaws which enable ESNs to be modified using the keypad on the mobile station. We believe that these services would expedite the conversion to authentication, thereby reducing cellular fraud, and we would be willing to provide these services if agreement can be reached with the manufacturers.

As set forth on the attached service list, copies of this letter and all attachments have been sent by mail to CTIA, McCaw, TIA, the Department of Justice, the Independent Cellular Services Association and each of the Commission representatives attending the July 27 meeting. Two copies also were hand-delivered to the Secretary's office today. Thank you again for your efforts in providing this opportunity to present our proposal and to attempt to reach some consensus among the parties on these issues. We look forward to further discussions with you and the other parties to resolve the issues raised in the pending petitions for reconsideration.

Very truly yours,

Timothy J. Fitzgibbon

Timothy J. Fitzgibbon
Counsel for
C-Two-Plus Technology

TJF:kdd
Enclosures

EXHIBIT ONE

PROPOSED RULE SECTION 22.919

§22.919 - Electronic Serial Numbers

(a) Definitions -- The following definitions shall apply for purposes of this section:

(1) Electronic Serial Number ("ESN") -- The ESN is a 32-bit binary number that together with the Mobile Identification Number ("MIN") identifies a cellular mobile station to any cellular system thereby enabling the cellular carrier to bill properly for all calls made or received by that mobile station.

(2) Operation -- A cellular mobile station is deemed to be in operation at any time during which it is powered on, regardless of whether it is then making or receiving a call.

(3) Extension Service Provider -- Any person who performs any service which involves the manipulation of the ESN of a cellular mobile station as permitted under subsection (c)(1) and/or (c)(2).

(4) Primary Cellular Mobile Station -- A cellular mobile station which is owned by a subscriber, registered with the subscriber's cellular system, and for which the subscriber receives a separate monthly bill from the system operator.

(5) Secondary Cellular Mobile Station -- A cellular mobile station owned by a cellular subscriber which is programmed to emit the ESN of that subscriber's Primary Cellular Mobile Station.

(b) Type-Acceptance of Cellular Mobile Stations -- In addition to the general requirements for type-acceptance set forth in Part 2 and Section 22.377 of the Commission's Rules, cellular mobile stations must be designed to comply with the following technical requirements:

(1) Any cellular mobile station initially type-accepted after _____ [a date approximately three months after the effective date of this rule] must be designed to comply with industry standards for authentication key and challenge-response calculation procedures established by the Telecommunications Industry Association.

(2) All other cellular mobile stations must be designed to comply with the Cellular System Compatibility Specification (see §22.933).